Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 77-105

ELLEN FINKELSTEIN, SIDNEY J. FINKELSTEIN, individually and as father and natural guardian of SHIRA FINKELSTEIN, an infant under the age of 21 years,

Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, Trans World Airlines, Inc. ("TWA"), respectfully submits this brief in opposition to petitioners' request for review of a non-final order of an intermediate New York State appellate court.

Jurisdiction

As discussed below, this Court does not have jurisdiction because the non-final order is not a final judgment or decree, 28 U.S.C. §1257(3).

Questions Presented

1. Is this non-final order a final judgment pursuant to 28 U.S.C. §1257(3)?

2. If this Court has jurisdiction should it grant review at this time?

3. Under the Warsaw Convention and Montreal Agreement imposing strict liability on an air carrier in international transportation for "death, wounding or other bodily injury," may a passenger recover for fright or psychic trauma alone?

Statement

Petitioners were on board TWA's plane scheduled to fly from Tel Aviv, Israel to New York on September 6, 1970 when it was hijacked by members of the Popular Front for the Liberation of Palestine to a desert airport near Amman, Jordan. (Pet. App. 22a-23a).[1] With the exception of periods outside and near the aircraft for purpose of exercise, petitioners spent most of their time on the plane either walking around or in their seats (Pet. App. 23a). On September 12, petitioners and the other passengers were permitted to leave the plane and complete their journey to New York.

As were other passengers on the plane during the hijacking, petitioners were discomforted by the heat during the day and the cold at night, the shortage of food and water, and the overused toilets (Pet. App. 25a). As did others, petitioners complained of backaches, stiff necks,

[1] References marked Pet. App. are to petitioners' appendix annexed to the Petition.

rashes, weight loss, nausea and, in addition, the fright or psychic trauma alone which was experienced during the hijacking but which neither was a consequence of, nor resulted in, any bodily injury (Pet. App. 25a).

Other passengers on the plane, the Rosmans, also sued TWA in the New York State courts and moved for partial summary judgment, claiming that TWA was absolutely liable under the Warsaw Convention, 49 Stat. 3000, T.S. 876, and the Montreal Agreement of 1966 (Agreement CAB 18900, 31 Fed. Reg. 7302).[2]

Article 17 of the Warsaw Convention provides:

> "The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The carrier's liability was made absolute by the Montreal Agreement, except where contributory negligence is shown, to the extent of a maximum of $75,000 per passenger (Pet. App. 57a).

New York's highest court granted summary judgment to the Rosman plaintiffs on the issue of TWA's liability stating:

> "[P]laintiffs should be allowed to prove damages for palpable, objective bodily injuries suffered, whether caused by psychic trauma or by the physical conditions on the aircraft, irrespective of impact, but not for psychic trauma alone." *Rosman* v. *Trans*

[2] Both the Convention and the Agreement are set forth at 49 U.S.C. 1502 note.

World Airlines, Inc. 34 N.Y.2d 385, 388, 314 N.E.2d 848, 850 (1974).

• • •

"It follows that, if proved at trial, she should be compensated for her mental anguish, *suffered as a result* of the rash, since this anguish would have flowed from the 'bodily injury'." *Id.* at 399, 314 N.E.2d at 856-857 (emphasis in original).

Pursuant to *Rosman,* therefore, TWA is strictly liable and must compensate petitioners for any bodily injuries, including bodily injuries caused by the fright or psychic trauma of the hijacking. In addition, TWA is strictly liable for any damages flowing from any bodily injury, such as pain and suffering or mental anguish. *Id.* at 399-400, 314 N.E.2d at 857.[3]

Petitioners are not content with this result and seek to hold TWA strictly liable for fright or psychic trauma alone which they claim they experienced during the hijacking even though this fright neither caused any bodily injury nor flowed from any bodily injury.

The Proceedings Below

Petitioners moved in the New York trial court for an order that at trial they could be compensated, in addition to any bodily injuries, for the fright or psychic trauma alone of being on a hijacked plane. They cited as support a federal district court decision, *Husserl* v. *Swiss Air Transport Co.,* 388 F. Supp. 1238 (S.D.N.Y. 1975).[4] The trial court denied their motion ordering that recovery for mental injuries could be had only to the extent permitted by *Rosman, supra,* and that petitioners could not recover at trial for fright or psychic trauma alone (Pet. App. 11a). The Appellate Division affirmed the trial court (Pet. App. 6a), and denied petitioners leave to appeal this non-final order to the New York Court of Appeals (Pet. App. 1a-2a). Petitioners now request this Court to review the order of the Appellate Division.

[3] Page 60 of the Petition refers to Riese & Lacour, Précis de Droit Aérien (1951), at p. 264, who state that the Warsaw Convention should be applicable to "the *consequences* of psychic trauma." (Emphasis added.) This position is no different from that of the court in *Rosman* quoted above, 34 N.Y.2d at 388, 314 N.E.2d at 850. Petitioners are not content to recover for the consequences of psychic trauma. They wish to recover for fear or psychic trauma alone.

REASONS FOR DENYING THE WRIT

I. This Court Does Not Have Jurisdiction

As stated in 28 U.S.C. Section 1257 "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court. . . ." The non-final order below does not fit any of the exceptions to the final judgment rule, and this Court should not grant certiorari at this time. The four exceptions to the final judgment rule discussed in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), do not apply to this case:

1. The outcome of the damage trial is not preordained. Petitioners might be awarded the maximum recovery allowed under the Convention, $75,000 per

[4] This decision, Husserl II, was never appealed. A previous decision in the same court, construing different language in the Warsaw Convention, determined that a hijacking constituted an "accident" within the meaning of the Convention. *Husserl* v. *Swiss Air Transport Co.,* 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam,* 485 F.2d 1240 (2d Cir. 1973) ("Husserl I"). Husserl I, a non-final order, was appealed to the Second Circuit pursuant to 28 U.S.C. §1292(b). Thereafter, the parties discovered a different federal question which resulted in Husserl II.

passenger, or be satisfied with some lesser amount. In either case, no reason to assert additional damage claims would necessarily impel them into this Court. The federal issue might be mooted.

2. For the reasons expressed in subparagraph 1, above, the federal issue may not necessarily survive regardless of the future state proceedings.

3. Petitioners may still seek certiorari if they are dissatisfied with the result of the state damage trial; the federal issue will not *necessarily* be mooted.

4. Finally, review of the case at this time would not preclude a state court damage trial. No serious erosion of any federal policy is likely to occur if this Court does not grant an immediate review (*Cox* at 482-3).

There is no record describing the precise damages. This case is not ripe for review (28 U.S.C. §1257(c)).

II. The Non-Final Order Below Does Not Conflict With the Decision of Any Court of Appeals

The court below and the New York Court of Appeals in *Rosman* are the only appellate courts to have interpreted the words at issue, "death or wounding of a passenger or any other bodily injury suffered by a passenger . . ." (Warsaw Convention, 49 Stat. at 3018). The four circuit court decisions cited by petitioners as creating a "significant conflict" (Petition p. 25), *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Martinez Hernandez* v. *Air France*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 1592 (1977); *Evangelinos* v. *Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977); and *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.),

cert. denied, —— U.S. ——, 97 S.Ct. 2939 (1977), are all inapposite. In those cases the issue was the meaning of the words "on board the aircraft or in the course of any of the operations of embarking or disembarking" (Warsaw Convention, 49 Stat. at 3018). The dispute was whether the Convention applied to passengers who were injured inside an air terminal building. Those cases did not concern and did not discuss whether "bodily injury" encompasses injury for fright or psychic trauma alone. No federal court of appeals has considered that issue.

The court below and the New York Court of Appeals in *Rosman, supra,* are the only appellate courts to have interpreted the words at issue. There is, therefore, no conflict between the decision below and that of any appellate court, state or federal.

III. The Guatemala Protocol May Obviate This Question in the Future

The Warsaw Convention was most recently amended in 1971 at Guatemala City. At Guatemala the words of Article 17 at issue here were changed from "death or wounding . . . or any other bodily injury" to "death or personal injury."[5] The Guatemala Protocol has been sent to the Senate for its advice and consent and hearings were held on July 26, 1977 (123 Cong. Rec. D1132 daily ed. July 26, 1977). The change in text may settle this issue as to future claims.

Finally, the Warsaw system is presently in transition. It has evolved from a system based on fault to one prem-

[5] ICAO Doc. 8932 (1971). The controlling French and the official English translations are as follows. The Warsaw Convention language, "mort, de blessure ou de toute autre lésion corporelle" translated "death or wounding . . . or any other bodily injury," was changed in the Guatemala Protocol to "mort ou de toute lésion corporelle" translated "death or personal injury."

ised on strict liability and, under the Guatemala Protocol, to one more akin to no-fault accident insurance with the passenger paying additional consideration for the coverage (CAB Order 77-7-85). The Guatemala Protocol, in conjunction with a Supplemental Compensation plan approved by the Civil Aeronautics Board will increase the limit of recovery from $75,000 to approximately $317,000 (*id.*). In addition, "further payments as may be required to effect full reimbursement of all reasonable medical expenses" will be made without regard to the $317,000 liability limitation (*id.*). The various economic and diplomatic considerations involved might best be left to the Senate at this time.

IV. The Decision Is Correct

The non-final order sought to be reviewed relies on *Rosman* v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385, 314 N.E. 2d 848 (1974) which is clearly correct.

The legislative history of Article 17 demonstrates that the drafters did not intend that there be recovery for fright or psychic trauma alone. The original 1925 Convention draft stated:

> "The carrier is liable for accidents, losses, damage to goods and delays." (Conférence Internationale de Droit Privé Aérien, Paris, October 1925, Ministère des Affaires Etrangères 41-42 Series C. 79 (1926)).

The 1925 draft was amended and the words death, wounding or any other bodily injury were inserted (*Compte Rendu de la 3e Session,* May 1928, Comité International Technique d'Experts Juridiques Aériens 125).

In 1952 the authoritative writer on French Air Law, Professor Juglart of the Law Faculty of the University of Paris, stressed that mental injury (lésion mentale) was

not included within the present text of Article 17. He suggested that the Convention might be amended to read: "lésion corporelle ou mentale" (Juglart, *Traité Elémentaire de Droit Aérien,* 330 (1952)).

The precise amendment that Professor Juglart proposed in 1952 was considered in 1955 at The Hague where representatives of the nations which adhered to the Warsaw Convention, including the United States, met to amend the Convention. The Greek delegate at The Hague proposed the very amendment that Professor Juglart had suggested three years earlier. He proposed that the words "any other bodily injury" be changed to "any other mental or bodily injury." The precise French words proposed were ". . . ou de toute autre lésion corporelle ou mentale subie par un voyageur . . ." (Conférence Internationale de Droit Privé Aérien, La Haye, September 1955, Vol. 1, Doc. 7686-LC/140, p. 261, O.A.C.I. 1956). Among all the delegates present not one could be found to second the proposal.

The drafters of the 1966 Montreal Agreement, a contract among most of the international air carriers approved by the Civil Aeronautics Board, did not intend to make and did not make any change to the text of the Warsaw Convention. *MacDonald* v. *Air Canada,* 439 F.2d 1402, 1405 note (1st Cir. 1971). Professor Andreas F. Lowenfeld, Chairman of the United States Delegation to the Montreal Conference in February 1966, and one of the architects of the Montreal Agreement, criticized an action for fright alone which arose out of the same hijacking to Jordan experienced by petitioners:

> "The Montreal Agreement applies only to death, wounding, or other bodily injuries suffered by a passenger. Thus, mere delay or anguish will not support

a suit under the Agreement" (The New York Times, September 30, 1970, at 42, col. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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